82-1199

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1982

No.

FRANK THOMPSON, JR.,

Petitioner

-vs.-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the principle of legislative independence, which inheres in the constitutional doctrine of separation of powers, is violated when agents of the executive branch of government attempt to lure a member of Congress into criminal conduct without basis to believe he is corrupt and without reasonable suspicion of criminal activity within the legislative branch generally.

2. Whether the principle of legislative independence and/or the radiations of the First and Fourth Amendments are violated when undercover agents of the Executive Branch, without cause or reasonable suspicion, lure a member of Congress into a seemingly private setting and surreptitiously videotape confidential discussion of legislative matters, processes and persons.

3. Whether it constitutes outrageous and

overreaching conduct in violation of the Due Process Clause when federal agents

(a) fabricate a criminal enterprise and seek to entice suspicion-free persons into corruption;

(b) delegate selection of targets to largely unsupervised middlemen who are known criminals and have motive to fabricate evidence;

(c) ignore their own rules and guidelines specifically designed to minimize the dangers of violating individual rights; and

(d) lure the unsuspecting target before a hidden video camera where skilled agent-actors exploit his known drinking problem to create an ambiguous and circumstantial filmed record staged to convey an aura of corruption.

4. Whether, contrary to the opinion below, the doctrine of entrapment as enunciated in United States v. Sorrells and

subsequent cases, permits a defendant who fails to assert entrapment as a factual defense at trial to assert it as a legal defense to his conviction.

5. Whether a jury instruction on "credibility" which refers in progressively harsher language to a defendant's "motive for false testimony" and "strong motive to lie," "chills" the right to testify on one's own behalf, and thus denies the right to a fair trial in a federal court.

6. Whether a defendant is denied a fair trial, Due Process of Law, and his right under Brady v. Maryland and United States v. Agurs when, despite a specific discovery request, the prosecutor conceals and a key witness denies that the witness was promised that he would not be indicted.

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OPINIONS BELOW

The opinion of the United Stats Court of Appeals for the Second Circuit, denying Petitioner's Petition for Rehearing on November 17, 1982 is reported at 692 F.2d 860, and is set forth in the Appendix at 1a.

The opinion of the Court of Appeals for the Second Circuit, affirming, on September 3, 1982, the conviction entered in the United States District Court for the Eastern District of New York (George C. Pratt, Judge) of Frank Thompson for violations of 18 U.S.C. §§201(c), 201(g), and 371 is reported at 692 F.2d 823, and is set forth in the Appendix at 4a.

The opinion of the District Court for the Eastern District of New York (George C. Pratt, Judge) denying Petitioner's post-trial due process claims is reported at 527 F. Supp. 1206 (1981), and is set forth in the Appendix at 84a.

The opinion of the Court of Appeals for the Second Circuit denying appellant's pre-trial motion to dismiss the indictment is reported at 642 F.2d 699

(1980), and is set forth in the Appendix at 273a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of conviction entered by the District Court, was entered on September 3, 1982. The order of the Court of Appeals for the Second Circuit denying the Petition for Rehearing was entered on November 17, 1982. This Petition for Certiorari was filed within sixty days of the final order of the Court of Appeals for the Second Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(I).

CONSTITUTIONAL PROVISIONS

This case involves the First, Fourth and Fifth Amendments and Article I, Section 1.

STATEMENT OF THE CASE

This is an ABSCAM case -- but it is different from most other ABSCAM cases in that the defendant former member of Congress denies that he ever succumbed to the FBI's blandishments.[1]

[1]The unique and circumstantial facts of the Thompson case require a fairly detailed statement.

At the time of his downfall at the hands of the Federal Bureau of Investigation and the Brooklyn Strike Force, Frank Thompson had served his country with honor and distinction for nearly 40 years, starting with his commission as an ensign in the Naval Reserve in October 1941; through distinguished naval service in World War II which brought him a Bronze Star, Gold Star, and a Naval Commendation Combat Medal; a return to active Naval duty during the Korean War; 3 terms in the New Jersey Legislature; and 13 terms in the United States House of Representatives, during which time he earned legislative distinction for his efforts on behalf of the arts, education, labor and civil rights.[2]

As ABSCAM impressario, Prosecutor Thomas Puccio, frequently acknowledged to the trial court, there was not the slightest hint during all those years of political activity that Frank Thompson was in one

[2]Frank Thompson's record of public service was set forth by the 8 character witnesses he presented at trial. For example, Former Rep. Father Robert Drinan of Massachusetts called him: "one of the great progressive spirits....totally without blemish" (Tr. at 2093-4). (References to the transcript of proceedings at trial are designated Tr. at ___)

whit corrupt or had ever sought any illegal personal financial gain from his public service.[3] Nevertheless, Prosecutor Puccio and the FBI agreed to permit a known swindler and con artist, Howard Criden,[4] to bring Thompson before hidden ABSCAM cameras where he could be tempted into corruption.

Thompson's involvement with ABSCAM -- the FBI ploy to have agents pose as representatives of fictitious sheiks prepared to invest petro dollars in the U.S. and to offer financial rewards to coopera-

[3]At the post-trial Due-Process hearing, Puccio admitted there was no basis for attempting to seduce Frank Thompson into taking a bribe. Puccio acknowledged: "Other than what had been developed through the ABSCAM tapes that had been made, ... we had nothing else specific on Congressman Thompson." (DP Tr. at 300-1. "DP Tr." refers to post-trial Due Process hearing.) Or, more directly: "There was no non-ABSCAM that pertained to Thompson." (DP Tr. at 301).

[4]Criden had graphically demonstrated his unreliaability and cupidity some months before when he attempted to swindle his purported "Arab" colleagues (who unknown to him were actually FBI agents) out of $50,000 by having his law partner, Ellis Cook, pose as an official of the Immigration Service, Mario Noto, who was to accept a bribe for alleged future services. (Tr. at 1230-1, 1093). Despite this deception, the FBI continued to rely on Criden's representations that certain public officials were corrupt and could be bribed.

tive public officials -- began on October 1, 1979, when the manager of his Lawrenceville, N.J. congressional office informed the Congressman that a constituent named Joseph Silvestri had called for an appointment because "he had some Arab investors interested in investing" in Thompson's district "relative to real estate and other matters." (Tr. at 2275) An appointment was made for October 4, and was noted in Thompson's office calendar. The following notation was added later:

> Mr. Silvestri called again, and this is in regard to some Arabs in the United States loaning money to Americans. He will be there by himself and maybe with their attorney. Arabs are late getting here and are still at the Ritz in New York. (Ex. TI; Tr. at 2280)

At that meeting, Thompson was introduced by Silvestri to Howard Criden, a Philadelphia lawyer who explained to Thompson that his Arab clients had in excess of $200 million deposited in the Chase Manhattan Bank and were prepared to invest large sums in Thompson's economically depressed 4th District

"principally in real estate and possibly in certificates of deposit." (Tr. at 2283) Although that was the first time Criden and Thompson had ever met, Criden had announced to the fake Arabs a week earlier he had Thompson "all lined up." (Ex. 1A at 1,3)[5]

Following the meeting, Thompson called Philadelphia Judge James Crumlish, with whom Thompson had served in the Navy and whom Criden mentioned as an acquaintance. Judge Crumlish confirmed that Criden was a former member of the Philadelphia District Attorney's office and that his reputation was "good." (Tr. at 2290-1)

The First October 9 Meeting

On October 9, Criden picked up Thompson at his Capitol Hill office and drove him to a noon meeting with the representatives of the "Arabs" at a townhouse on W Street in Washington. Explaining how he got Thompsom to come to the house, Criden later told

[5]Exhibit 1A-37A are transcripts of various video and/or audio tape recordings. Ex. 1A is the transcript of a telephone conversation between Criden and FBI Middleman Melvin Weinberg, a convicted swindler who devised the ABSCAM scenario for the FBI in an effort to avoid imprisonment on unrelated convictions.

Weinberg and FBI agent Anthony Amoroso -- who Criden knew only as "Tony De Vito" -- that he had used "the certificates of deposit and shit like that" as a "come-on." (Ex. 7A2) The meeting took place in front of the FBI's hidden cameras.[6] As all the tapes open, Agent Amoroso was counting out $50,000 in $100 bills into a briefcase. He comments to the camera (and some future jury) that the money was for Frank Thompson, Jr. (Ex. 7A1 at 1) Thompson then enters with Criden, who introduces him to DeVito (Agent Amoroso) and sting-man Weinberg. After several drinks and desultory conversation about wines and the price of real estate, Weinberg turns the conversation to the sheiks and possible future immigration problems. The following exchange then takes place:

Amoroso/DeVito: Can this be

[6]Petitioner beseeches the Court to view all of the October 9 videotapes in order to get a true picture of ABSCAM as it relates to Frank Thomspon. The Court of Appeals viewed none of the three videotapes prior to decision. It finally viewed the final October 9 segment after defendant filed a Petition for Rehearing. (283a) ("a" refers to the Appendix to this Petition.) Petitioner has certified the five October 9 videotapes (Ex. 7) for immediate transmittal to the Court pursuant to Rule 19.1.

> stalled for an extended period of time, and then what to do while the bill is, while the bill is.
>
> Frank Thompson: Well, it can be stalled, but it's very difficult, very difficult.
>
> Amoroso/DeVito: Well, that's what the money is for, is to, is to, you know, keeping this thing going.
>
> Frank Thompson: Well, I'm not looking for any money, and uh ... It depends on the circumstances. I mean if the person is clean, not a Communist and not a known criminal and ... (Ex. 7A1 at 13) (emphasis added)

After further discussion about the intricacies of the immigration laws, Frank Thompson picked up the phone, called his office, and discussed the matter with Jane Butterfield, his immigration specialist. (Ex. 7A1 at 14-16) He asked her to put a memo on his desk, which, according to office practice, meant to check it out with the Immigration and Naturalization Service. (Tr. at 2213)[7]

The conversation turned to the possibility of

[7]This is hardly the action of a criminal conspirator.

investments, particularly Certificates of Deposit in three small independent Trenton banks, and Weinberg assured Thompsor there was no problem:

> You got to remember he's got approximately four hundred million or more. He keeps that in this country at all times. All right?

Weinberg then turned the conversation back once more to the immigration problem:

> So, what there has to be done is, is there has to be a bill presented by some politician to put into Congress for him to stay here as a political refugee... What I'm asking you actually in plain English is that he could depend upon you to try to help him. (Ex. 7A1 at 17) (emphasis supplied)

Thompson gave this conditional response:

> On the basis of this conversation, I'll say to you, I'll be glad to help if I can, but you must understand the limitations of our law and the complications that there are in it. What I say to you is, if your client needs help, uh, meets the standard requirements that that client will get the help and get it speedily and efficiently. (Ex. 7A1 at 28)

At the close of the meeting Amoroso/DeVito told Criden he wanted to talk to him after he dropped Thompson back at the Capitol.

Criden's Meeting With Weinberg and Amoroso

When Criden returned to the W Street house after taking Thompson back to the Capitol, Agent Amoroso expressed great discomfort over Thompson's refusal to accept money:

> I'm uncomfortable ... we dealt with two other guys[8] ... we did business, everything was fine... but the guy says to me he don't want anything, alright. Later on he started mentioning about us putting money in banks down there... now that could of been what he wanted. (Ex. 7A2 at 1-2)

Amoroso then told Criden 27 additional times he distrusted what had occurred. He accused Criden of trying to "rip him off," and accused him "of not telling Thompson what the facts were." (Tr. at 953) Finally, Amoroso tells Criden to "call him up and scratch him." (Ex. 7A2 at 10) Shortly thereafter

[8]Presumably ABSCAM defendants Myers and Lederer.

the phone rang (Ex. 7A2 at 13), and Amoroso thereafter changed his tune.[9] He agreed that Thompson need not accept the cash, nor even verbally acknowledge receipt of the cash. Weinberg then summed up the new ground rules: "Let's get the rules straight now. We agreed that you come here, nothing be said, just hand him the valise." (Ex. 7A2 at 30) Criden emphasized: "No conversation except that here's some documents or shit like that." (Ex. 7A2 at 32-33)[10] In case Criden couldn't convince Thompson to follow the new script, the old pro Weinberg had some sage advice:

> [T]he shittin' guy's a boozer.
> (Ex. 7A2 at 37)
>
> *******
>
> Give him another drink...

[9]Amoroso frequently received instructions in this manner from Justice Department officials who monitored these meetings via closed-circuit television.

[10]The arrangement is directly contrary to the Department of Justice guidelines for this type of entrapment situation. The guidelines require that the bribe be up front, that the cash be delivered directly and by hand and the quid pro quo be spelled out in plain English. (DP Ex. 110 at 138; DP Tr. at 448-52)

(Ex. 7A2 at 40)[11]

The final meeting on October 9

Criden went back to the Capitol, located Congressman Thompson, and told him several things. First, he told Thompson that the Arabs were ready to invest in Certificates of Deposit, and they wanted the names of the local Trenton banks. Thompson wrote out the names of the three banks on a card, and handed it to Criden. Second, Criden warned that the Arabs were distressed when Thompson had let it be known that the Sheik might need political asylum. This was meant to be a deep secret.[12] Third, Criden said he could drive Thompson home that night (Thompson did nct have his car) and stop off at W Street to deliver the information concerning the Butterfield immigration memorandum. (Tr. at 2318;

[11]Although there are frequent references in the tapes to Thompson's perceived drinking problem, (e.g.: Ex. 7A2 at 34, where Thompson is referred to as an "alky"), the videotapes show Amoroso and Weinberg providing him at least 3 drinks during the 60 minutes Thompson spent with them on October 9).

[12]This can easily explain why Thompson was so ready to concur in the need for caution at the final meeting -- a fact which the Court of Appeals found highly incriminatory. (22a, 80a)

Ex. TC) He also said they might pick up some business papers.

The tapes show what happened next. It opens with Agent Amoroso again stuffing $50,000 in one hundred dollar bills into a briefcase. (Ex. 7A5 at 1.)

Thompson and Criden arrived at 7 p.m. and stayed for about 15 minutes. As soon as they arrived, Criden took the briefcase from the nightstand and put it on the floor in front of Thompson. Criden said, enigmatically: "Frank understands the situation." Amoroso/DeVito replied: "I just want to make sure that, you know, you understand. There's the briefcase." (Ex. 7A5 at 1) At this point, both Thompson and Criden reached for the briefcase. Thompson quickly relinquished it to Criden, and said "Look at that for me, will you."[13]

---

[13]This statement has taken on extraordinary significance in this case. The prosecution, in what can only be described as a case of pure wishful thinking, has consistently translated those words as "Look after that for me will you" (7A5 at 2), words indicating that Thompson was aware there was money in the briefcase. Indeed, the Court of Appeals was so impressed with that alleged statement, it quoted it at three separate and unrelated parts of its opinion to demonstrate that the evidence against Thompson was clear and that his due process rights were scrupu-

There was then a discussion based on the immigration report prepared by Jane Butterfield (Ex. 7A5 at 4-5), and a discussion about investments in the Trenton Banks and in Trenton real estate developments. Finally Amoroso/DeVito suggested that Criden might be "good for a $10,000 campaign contributon." Thompson replied: "No, no." (Ex. 7A5 at 11) Thompson continued: "I wouldn't take a ten thousand...." At this point Criden laughed, and Amoroso/DeVito changed the subject to Certificates of Deposit and real estate investments. (Ex. 7A5 at 12-13)[14] The meeting ended, and Criden drove Thompson

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tously protected. (See 22a, 47a, and 80a) In his Petition for Rehearing, defendant pointed out the inaccuracy of the quote, urged the Court to at least view and listen to the tapes of October 9 and submitted an affidavit from an audio engineer stating that the video tape "clearly states 'you look at that for me, will you'" (326a), words consistent with Thompson's claim that he thought the case contained business documents. The Court then viewed the final October 9 tape and astoundingly concluded that "After viewing and hearing the videotape, we cannot be certain whether the disputed word was 'at' or 'after'." (2a) Then, ignoring the heavy emphasis it had placed upon that sentence in its first opinion, the Court of Appeals announced that it really made no difference which version was correct. Id.

[14]In connection with Thompson's claim that he met with Criden, Amoroso and Weinberg to obtain new business for Trenton, the record reflects continuing

to his home in Alexandria, Virginia.[15]

The Indictment and Conviction

None of the foregoing constitutes the substantive offenses for which the defendant was indicted, but it was the evidence relied on by the prosecution as proof of Thompson's participation in a bribery conspiracy. Frank Thompson was actually indicted for a connected series of offenses growing out of the alleged passage of a briefcase filled with money to Criden in the presence of Representative John Murphy at a Kennedy Airport motel on October 20, 11 days after the meeting at the townhouse in Georgetown.[16]

efforts in this regard. Tr. at 2520, 1249, 1639-43, 1327, 1389, 1390.

[15]Criden later told his partner, Ellis Cook, that he had passed Thompson $20,000 in $100 bills in the back of the rented limousine (Tr. at 1246), but the chauffeur hired for the occasion did not see or hear any such thing. (Tr. at 1536, 1549) The indictment does not charge a bribe was given at this time; it charges a bribe payment was made to Thompson several weeks later at a restaurant in New Jersey.

[16]Former Congressman Murphy stood trial with Thompson and is filing a Petition for Certiorari contemporaneous with Thompson's. Rather than devote precious space to the October 20 meeting at Kennedy Airport, Petitioner will assume that the Murphy petition will set forth the events that transpired there, none of which further incriminated Thompson.

The government's evidence came from Ellis Cook, who testified under immunity that his partner Criden had told him that he gave $25,000 of the money on October 22 to Thompson to share with Murphy. In addition, Rep. John Murtha of Pennsylvania, who falsely denied that he had been promised immunity for his own ABSCAM role,[17] testified that Thompson spoke to him on the House floor about some rich Arabs who had money to invest in their districts and that "there would also be some walking around money available" for cooperative Congressmen in the amount of $50,000.

Based on the above testimony, a jury found Petitioner guilty of bribery (18 USC 201)(c), conflict of interest (18 USC 201(g), and conspiracy (18 USC 371). He was acquitted of accepting an illegal gratuity (18 USC 203(a). The trial judge dismissed a count under the Travel Act (18 USC 1952).

[17] It was only subsequent to trial that defendant discovered that Murtha had in fact been assured by the prosecution that he would not be indicted. The failure of the prosecution to correct Murtha's false testimony has been consistently cited by defendant as a violation of Brady v. Maryland, 373 U.S. 83. See pages 62-65, infra.

Subsequent to the jury verdict, the trial court conducted a lengthy combined hearing into the claims of a number of ABSCAM defendants that their indictments and conviction violated Due Process. All of those motions were denied. (84a)

The trial judge deferred sentencing of Thompson pending a post-appeal review of his medical situation and temporarily imposed a statutory sentence under 18 USC 4205(c).

The Motion for a New Trial

After defendant filed Notice of Appeal, information began to be revealed from various sources (including Weinberg's former wife) that Melvin Weinberg had caused at least one other ABSCAM target, a former member of the New Jersey Casino Control Commission, Kenneth MacDonald, to be falsely accused of accepting a bribe while Weinberg himself pocketed the "bribe" money. The new evidence is now the basis of a motion by defendant Thompson for a new trial which was denied by the trial court and is pending appeal in the Second Circuit. (Docket No.

82-1271)[18]

REASONS FOR GRANTING THE WRIT

This petition poses issues of extraordinary significance to the future of law-enforcement in this country as well as to the future of our constitutional structure. The trial judge wrote that from the very beginning of ABSCAM:

> [I]t was apparent that these were significant cases to the defendants, to the FBI, to the Justice Department, to the public, and perhaps even to the very structure of our governmental system.... The integrity of both the FBI and the Justice Department has been vigorously challenged. A novel investigative technique has been employed against members of Congress and others without specific suspicions. And the entire matter had been given extensive national coverage in the news media, reflecting not only the importance of the criminal actions, but fundamental political and constitutional issues in which many

[18]It is defendant Thompson's position that the prosecution was aware all along of Weinberg's double-dealing with MacDonald but concealed that information despite specific discovery requests. Since Thompson claims that he was similarly victimized, he contends that he should have been permitted to present to the jury the evidence of how Mel Weinberg had victimized Mr. MacDonald.

Defendant suggests to the Court that it might wish to defer action on this Petition pending disposition of the new trial appeal. If affirmed, that matter might appropriately be merged with this one.

segments of the population had an interest. (115-6a)

ABSCAM is sui generis. Little in our jurisprudence precisely prepares us for the issues it presents -- especially as they are framed by the conviction of former Congressman Frank Thompson, Jr., a much honored public servant who had never been tainted with the hint of corruption during a long and distinguished military and political career until he was lured before the secret cameras of ABSCAM.

As a test of our criminal jurisprudence, the outcome of this case will decide whether law enforcement in this country is to be transformed from a system of prevention and detection to one of creation and inducement.

Equally far-reaching is the potential impact of this case upon the political and legislative process and upon fundamental rights of privacy of all Americans. As the Court of Appeals observed in regard to ABSCAM:

> The Executive Branch of the government of the United States

> has carried out a plan to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so. In a constitutional democracy this maneuver inevitably raises sensitive issues of public policy and public law. (251a)[19]

Other sensitive issues of law and public policy are raised by the use of hidden cameras to surreptitiously film private conversations of individuals about whom there was no suspicion of corruption or reason to believe they were criminally inclined. This Court has never addressed the issue of unconsented videotaping of private individuals by law-enforcement agents, let alone the question of the propriety of luring a member of a coordinate branch of government before those cameras on the pretext of discussing legitimate legislative business.

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[19]United States v. Myers, 635 F.2d 932, 934 (1980), cert. den. 449 U.S. 956 (1980) (hereinafter referred to as Myers I). This was the pre-trial, interlocutory appeal by one of the ABSCAM defendants tried in the Eastern District of New York. (Included in the Appendix beginning at 250a)

I. THE AUTHORITY OF GOVERNMENT AGENTS, IN THE ABSENCE OF EITHER INDIVIDUALIZED SUSPICION OR CAUSE TO BELIEVE ANY LAW HAS BEEN VIOLATED, TO LURE A MEMBER OF CONGRESS BEFORE A HIDDEN CAMERA TO TEMPT HIM INTO CORRUPTION AND USE THE RESULTING VIDEOTAPE AS THE BASIS FOR A CRIMINAL PROSECUTION, PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NEVER BEEN DECIDED BY THIS COURT

As set forth earlier, Congressman Thompson, a man of impeccable reputation, was lured to the W Street townhouse solely on the representation of a known swindler and confidence man, Howard Criden, that Thompson could be corrupted.[20] Criden was

[20]The FBI's sting-man, Mel Weinberg, Launched Criden on his hunt for political big-game with the following words of encouragement:

> Mel Weinberg (MW): Now, who else we got lined up?
>
> Howard Criden (HC): Well, we can get anybody you want, any one. Within reason I can produce almost anybody you want.
>
> MW: ... OK now the only other thing I want to ask you is how about some Republicans? Doesn't it look bad it's all Democrats?
>
> HC: Alright I'll try ... I'll go to work on that today to try to get you some ... Would you like some governors?
>
> MW: Yeah why not.

allowed to bait his ABSCAM hook with promises of economic relief for Thompson's depressed Congressional district. Indeed, it would have bordered on neglect of fiduciary responsibility to his constitutents for Thompson to have out-of-hand rejected Criden's offer of millions of dollars available for job-producing investments in the Trenton, N.J. area.

Having lured the unsuspecting Congressman to an apparently private meeting with the promise of aid for his distressed district, the Executive Branch's agents proceeded to ingratiate themselves into his confidence, displaying a false air of comraderie while plying him with liquor.[21] All the while, of

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HC: Congressmen, Senators, Governors, what else?

MW: Any guy in Washington (IA) and they're happy as a lark ... (Ex. MC at 1-2)

[21]See fn. 11, supra. Howard Criden later testified before the Senate Select Committee on ABSCAM that Thompson "after drinking rather heavily all afternoon ... was pretty well shot by the time we came back for the second meeting." (Criden Testimony at 95) (The Criden Senate testimony is included in the appendix to John Murphy's motion for a new trial filed Dec. 14, 1982 in the Eastern District of New York, Docket No. 80 CR 00291)

course, the Executive Branch's cameras were grinding away, recording for posterity any lewd, obscene or impolitic comment or gesture made by the Congressman in this apparently private and confidential atmosphere.

During the course of some 60 minutes of candid and unguarded conversation, the agents succeeded in goading Thompson to belittle and ridicule several of his Congressional colleagues (Ex. 7A1 at 7-8, 11-12); brag about his power and influence in Congress and New Jersey politics (Ex. 7A1 at 6-7; 7A5 at 8-9); and generally comport himself in locker-room fashion. Anyone watching the October 9 tapes will quickly recognize that whether or not Frank Thompson had done anything remotely incriminating in front of that hidden camera, those tawdry tapes would be a powerful weapon in the hands of any political opponent.[22]

The Court of Appeals, however, could find no

[22]Recent history reminds us that one former FBI Director maintained sensitive materials in a private "Do Not File" file in his private office. See Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Congress, 2d. Session, Book III at 358 (1976).

constitutional violation in the behavior of the agents of the Executive Branch. It dispatched defendant's claims of violation of legislative independence and the doctrine of separation of powers with the assertion that "the Constitution does not provide Members of the Legislative Branch with any extra protections beyond that guaranteed to all citizens" with the exception of Section 6, Article I, the Speech or Debate Clause, which defendant conceded was not directly applicable to the issue. (28a) Defendant's objection to surreptitious videotaping in the absence of either judicial warrant or reasonable suspicion was summarily rejected with a reference to United States v. White, 401 U.S. 745 (1971) and Lopez v. United States, 373 U.S. 427 (1963).[23] (82a)

[23]The Court below also erroneously suggested that defendant had waived objection to the videotapes by failure to submit a timely motion to suppress their use at trial. (82a) In his Petition for Rehearing, defendant pointed out that he had indeed asserted in his pretrial motion to dismiss the indictment that: "Alternatively, the evidentiary fruits of these activities, including the videotapes ... should be suppressed." (At p. 22, n.12) The Court of Appeals failed to respond to this point in its denial of the Petition for Rehearing. (1a)

A. The Holding of the Court of Appeals, That Aside From Art. I, Sec. 6, the Constitution Provides No Protection Against Executive Encroachments Upon Legislative Independence, Threatens Fundamental Principles of Separation of Powers Which Are the Bedrock of Our Political Democracy

There is nothing arcane or academic in the concept that ours is a government of Separation of Powers with appropriate and strong checks and balances. Northern Pipeline Const. v. Marathon Pipeline Co. ____ U.S. ____, 102 S.Ct. 2858, 2864 (1981); United States v. Will, 449 U.S. 200, 101 S.Ct. 471, 482 (1980). See also Immigration and Naturalization Service v. Chadda, No. 80-1832, reargued before this Court, 51 U.S.L.W. 3453 (Dec. 14, 1982). And as this Court noted in United States v. Nixon, certain rights and privileges "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. 683, 705 (1974)

It is true that this Court has held that the Speech or Debate Clause, Art. I, Sec. 6, does not immunize members of Congress from prosecution under bribery statutes, United States v. Brewster, 408 U.S.

501 (1972), and petitioner makes no claim to any general immunity. It is his contention, however, that the principle of Separation of Powers, of which the Speech or Debate Clause is but "one manifestation... for ensuring the independence of the legislature," United States v. Johnson, 383 U.S. 169, 179 (1966) should be held to preclude the arbitrary targeting of members of Congress as the unwitting subjects of Executive Branch experimentation in the corruptibility of public officials. As this Court only recently repeated, the checks and balances built into the tripartite Federal Government were regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Northern Pipline, supra, 102 S.Ct. at 2864, quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

The Separation of Powers principle was described by James Madison in the Federalist Papers as one requiring that none of the branches "possess, directly or indirectly, an overruling influence over

the others in the administration of their respective powers." (Federalist Papers, No. 48, quoted in United States v. Johnson, supra, 383 U.S. at 178-9.) This point was expanded by Thomas Jefferson, who wrote that "it was part of the common law, adopted as law of this land, that [the people's] Representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 8 The Works of Thomas Jefferson 322 (Ford. Ed. 1904).

Preservation of that principle, Mr. Justice Jackson reminded us in the Steel Seizure Cases, requires constant vigilance, because the inherent power and prestige of the Presidency "exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness." Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 653-4 (1952). (concurring opinion)

Commitment of the law enforcement and prosecutorial functions in the Executive made it necessary to surround members of the legislative branch with

protections against the misuse of those functions. The Speech or Debate Clause is one of those shields which "prevent intimidation by the executive and accountability before a possibly hostile judiciary." United States v. Johnson, supra, 383 U.S. at 180-1.[24] But the Speech or Debate Clause has a narrowly restricted scope, and this Court has not hesitated to rely on the very structure of our government, as designed by the Framers, to invalidate other Executive attempts to overreach the legislative branch. See, e.g., Youngstown Sheet & Tube v. Sawyer, supra. In the final analysis, Mr. Justice Jackson observed in Youngstown, "men have discovered no technique for preserving free government except that the Executive be under the law." 343 U.S. at 655. Enforcement of that command is the special province of the judicial branch, which is why this Court must now determine the legal limits of Executive intrusion into the

[24]When the ABSCAM prosecutors developed the "asylum scenario," they necessarily focused on members of Congress (DP Tr. at 1421), in whom the Constitution lodges authority over matters of immigration and naturalization. That focus was adopted despite the absence of evidence of actual corruption involving immigration legislation.

legislative domain when the legislators themselves have not provoked Executive action by prior violations of normative rules which the Executive is empowered to enforce.

As Mr. Chief Justice Burger has more recently reminded us, the main inspiration for the long struggle for legislative independence, both in this country and in England, has been the fear of "the instigation of criminal charges against critical or disfavored legislators by the Executive..." United States v. Helstoski, 442 U.S. 477, 491-2 (1979), quoting from United States v. Johnson, supra, 383 U.S. at 182. Even "the mere threat of an indictment is enough to intimidate the average Congressman and jeopardize his independence." Id. at 205. The danger that disfavored legislators will become the targets of prosecution by the Executive is greatly enhanced when the allegedly illegal conduct that is made the subject of prosecution is entirely the product of government inducement. For in such a

situation there is no natural check on the selection of targets[25] or on overzealous efforts to generate a prosecution.

Further compounding the problems inherent in the application of bribery "stings" to the conduct of elected officials is their dependence on the campaign contributions of constituent groups. As Mr. Justice White has noted, "[m]utuality of support between legislator and constituent is inevitable.... It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported or will support, by speech making, voting, or bargaining with fellow legislators." United States v. Brewster, 408 U.S. at 558 (dissenting opinion). This provides, as Mr. Justice White further noted, wide "scope for an Executive prone to fish in legislative waters ... The possibi-

[25]Judge Fullam, who presided at the Philadelphia trial, observed that Mel Weinberg was "strongly motivated to produce results for his FBI employers." United States v. Jannotti, 501 F. Supp. 1182, 1193 (1980), reversed 673 F.2d 578 (3d Cir., 1982), cert. denied, ____ U.S. ____, 102 S.Ct. 2906 (1982). Weinberg also indicated a desire to even up the score by producing "some Republicans." (Ex. MC at 1-2)

lities are indeed endless, as is the potential for abuse." 408 U.S. at 560.

Robert Stewart, the Attorney in Charge of the Justice Department's Newark Strike Force, commented on this problem in an early ABSCAM memo. In his judgment, ABSCAM posed dangers not present in more traditional sting operations involving contraband, where the illegality of the transaction involved is unmistakable from the outset. According to Stewart:

> In the present investigation, the circumstances are fundamentally different because there is nothing inherently illegal about either the nature of the meeting place or the general topic of conversation. Indeed, absent specific facts to the contrary, there is an initial presumption of legality because of the positions which the suspects occupy and because of the ostensibly legitimate nature of the things under discussion--whether those things be the operation of a business, economic development in a particular area, or the protection of the human rights and indeed the very life of a foreign national who is touted as nothing more than a legitimate entrepreneur. Hence, the decision for further investigative action cannot be controlled by the criteria which govern such decisions in a conventional "sting" operation,

> but must depend instead upon the demonstrable existence of special facts which infect the particular transaction with illegality. (DP Ex. 15 at 4)

To prevent the improper targeting of non-predisposed defendants, Prosecutor Stewart thought it necessary to develop an independent basis on which to assess each individual's willingness to engage in criminal activity. Id. That was not done here. The government relied completely and uncritically on Howard Criden's representations as to Thompson's corrupt intentions--despite the fact that Criden had previously demonstrated his unreliability in a variety of contexts.[26]

Police discretion to single out targets for surveillance and/or prosecution is intolerable under any circumstances because of the "grave danger" of abuse, Delaware v. Prouse, 440 U.S. 648, 662 (1979), holding that highway police may not arbitrarily choose which motorists to investigate absent reasonable cause to

[26] See Statement of the Case. Moreover, executive branch agents persisted in their efforts to compromise Thompson even after he had rejected their initial offers of a bribe (Ex. 7A1 at 13) and even though Agent Amoroso remained unpersuaded that Thompson had any intention of succumbing to their corrupt offers. (Ex. 7A2)

select one rather than another. And OSHA inspectors may not arbitrarily choose which business to target for safety inspection. Marshall v. Barlow's, 436 U.S. 307 (1978). Otherwise, individuals would be subjected to the whim and caprice of prosecuting officials. See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy statute), and Grayned v. City of Rockford, 408 U.S. 104 (1972) (picketing regulation).

In each of the above-cited cases, this Court was concerned with the dangers of arbitrary and discriminatory enforcement inherent in any scheme which lacked objective standards limiting the discretion of the public officials responsible for enforcing the law. In none of those cases did the Court assign to the defendant the nigh impossible task of demonstrating that the government had actually abused its discretion in selecting him as the target for prosecution or investigation. Instead, the Court insisted on the observance of objective standards to

justify governmental intrusion on the individual's privacy and security.[27] Certainly, the need for restraint on arbitrary action is far more compelling here, where the instrusion involves the marshalling of sophisticated and powerful manipulative techniques to entice members of a coordinate branch of government into criminal activity.

Since it is unquestioned that at the time former Congressman Thompson was subjected to inducement to commit federal crimes the government had absolutely no basis for suspecting that he had ever conducted his legislative affairs in a corrupt or illegal manner,[28] this case presents the appropriate vehicle for determining the scope of FBI authority to tempt

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[27]While the Senate Select Committee concluded that ABSCAM itself did not encroach upon legislative independence or endanger "the constitutonally mandated separation of powers," it did assert that "Secret police powers exercised honorably by today's high-minded officials can readily be tomorrow's abuses in the hand of less scrupulous administrators." (Final Report, "Summary of Recommendations," at 70.)

[28]As the trial court noted, there was no evidence of any prior activity on the part of any of the defendants, including Thompson, that "would warrant suspicions of criminality in the conduct of their legislative affairs." (148a)

legislators into corruption.

B. The Surreptitious Videotaping of a Congressman's Conversation, in the Absence of a Warrant or Reasonable Suspicion to Believe a Crime Had Been Or Was About to be Committed, Jeopardizes Rights of Privacy Protected by the Conjunction of the First & Fourth Amendments as Well as the Principle of Legislative Independence

The Court of Appeals mechanically applied this Court's holdings in White, supra, and Lopez, supra, in concluding that "mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." (81-2a) In so doing, the Court failed to consider (1) the fact that in both White and Lopez the police had probable cause to believe the targets of the surveillance were involved in commission of a crime; (2) the substantial differences between audio and videotaping and the impact on society of unrestricted police use of hidden cameras; or (3) the impact of such methods upon the political process when employed against a member of the legislative branch.

In both Lopez and White, government agents had

implanted either a recorder or a transmitter on an informer involved with the defendant in an illegal transaction.[29] In each case, this Court held there was no constitutional infirmity in using a device that could corroborate the informant's testimony about the transaction. Both Lopez and White were suspects in ongoing criminal investigations against whom there was substantial probable cause to believe they were about to commit a crime.[30] The only substantial constitutional issue involved was whether, despite probable cause, such surveillance required advance judicial approval in the form of a warrant.

In sharp contrast, the FBI had neither a warrant nor probable cause to target Frank Thompson. Thus, this case presents the issue of electronic sur-

[29] In Lopez, the informant recorded the conversation on a tape recorder concealed on his body. In White, the radio transmitted the conversation to agents who were monitoring the frequency.

[30] Lopez was an innkeeper who had previously offered the wired Internal Revenue agent a bribe to minimize his tax liability. 373 U.S. at 430. White was a narcotics dealer who had previously engaged in illegal transactions with the bugged informant. 401 U.S. at 745.

veillance in a context not contemplated by this Court in either Lopez or White.

If, in fact, law enforcement agencies have carte blanche to electronically monitor the conversations of Americans, elected officials or not, whenever there is other-party consent, the implications for our notions of privacy and liberty are far-reaching. Even in the far less threatening circumstances of Lopez, Mr. Justice Brennan's dissent warned of the deliterious social consequences of assigning such powers to police agencies: "Electronic surveillance, in fact, makes the police omniscient, and police omniscience is one of the most effective tools of tyranny." 373 U.S. at 466. In addition to the dangers such surveillance posed to the rights of privacy and liberty guarded by the Fourth and Fifth Amendments, Justice Brennan also warned of its capacity to stifle free communication and discourse guarded by the First Amendment: "Electronic surveillance destroys all anonymity and all privacy;

it makes government privy to everything that goes on." Id. at 471. Twenty years before ABSCAM, Justice Brennan added these prophetic words:

> I cannot but believe that if we continue to condone electronic surveillance by federal agents by permitting the fruits to be used in evidence in the federal courts, we shall be contributing to a climate of official lawlessness and conceding the helplessness of the Constitution and this Court to protect rights 'fundamental to a free society.' (Id. at 470)

Several years later, Mr. Justice Harlan, the author of the Lopez majority opinion, echoed the Brennan dissent when police monitors were permitted to tune in on the bugged conversation in the White case. Calling for judicial supervision of such practices, Mr. Justice Harlan wrote that "were third-party bugging a prevalent practice, it might well smother that spontaneity... that liberates daily life." Id. at 787. Without a warrant procedure, he warned, "every law-abiding member of society is at risk." Id. at 789.

Growing judicial concerns over the consequences

of a "bugged" society were noted by Professor George Dix of the University of Texas Law School in "Undercover Investigations and Police Rulemaking," 53 Tex. L. Rev. 203 (1975). Warning of the threat to privacy interests when police use electronic surveillance techniques, Professor Dix noted "the effect may be indirect. Each person not themselves the subject of such investigations may be affected by awareness that such investigations occur and the possibility that they may be subjected to one." Id. at 211-12. Professor Dix emphasized that "especially important activities," such as the free exchange of ideas, will be undermined by "actual or anticipated undercover investigations." Id. at 212.

A similar theme was sounded by this Court in a unanimous opinion in United States v. United States District Court, 407 U.S. 297 (1972) holding unconstitutional so-called "domestic security" wiretaps in the absence of a warrant. There, the Court warned that "Fourth Amendment protections become the more necessary when the targets of official surveillance

may be those suspected of unorthodoxy in their political beliefs," because "[t]he price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power." Id. at 314

Analogous issues are raised by this case. In District Court, this Court forbade the electronic surveillance of political dissidents without a warrant based on probable cause because of the pall that would be cast over the right of dissent if government agents were allowed to exercise such power in the name of "so vague a concept as the power to protect 'domestic security.'" Id. at 314 In this case, the Court should consider the scope of FBI power to secretly videotape Frank Thompson under the equally vague rubric of ferreting out official corruption, because of the impact such power in the hands of the executive branch would have upon the political independence of members of the legislative branch. This case, like District Court, involves a "convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." Id. at 313.

The threat posed grows increasingly ominous as science furnishes police agencies with ever more sophisticated and intrusive means of surveillance.[31] See generally A. Westin, Privacy and Freedom (1967). Electronic audio bugging intrudes upon the privacy of an individual's spoken word; videotaping goes substantially further by seizing the visual manifestations of an individual's actions as well as aural impressions. Recent sociological and psychological studies have examined the impact on behavior of overt videotaping. It is obviously much more dif-

[31] A half century ago, in Olmstead v. United States, 277 U.S. 438, 474 (1928), Mr. Justice Brandeis predicted:

> Ways may some day be developed by which the Government without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrence of the home ... Can it be that the Constitution affords no protection against such invasions of individual security?

Much later, the Court in Silverman v. United States, 365 U.S. 505, 509 (1961), warned of "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society." A few years later Justice Douglas warned that "we are rapidly entering the age of no privacy, where everyone is open to surveillance at all times." Osborn v. United States, 323 U.S. 322, 341 (1966).

ficult to test the impact on behavior of covert videotaping once it is socially recognized that such surveillance is permissible. Ironically, other government agencies have apparently acknowledged the dangers of surreptitious videotaping and have adopted strict guidelines forbidding its use in funded research. See Weimann, "Effects of Laboratory Videotaping Procedures on Selected Conversation Behaviors," 7 Human Communications Research 302 (1981).

But surely the most vivid description of the impact of the ubiquitous video-camera on human behavior comes not from social science, but from literature. It is from George Orwell's classic novel of life in the fictional Oceania, which, appropriately, takes place in the year "1984":

> There was, of course, no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire, was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they

> wanted to. You had to live--did live, from habit that became instinct--in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.
> [George Orwell, 1984]

This case presents this Court an opportunity to consider just how far this society shall be permitted to proceed down that chilling path. If the FBI could film the meetings of Frank Thompson at the house on W Street, then why could they not do the same after luring him to a barroom or an illicit bedroom--possibly on a theory of ferreting out Congressmen who might be subject to sexual blackmail? If they can do it to a Congressman who has legislative jurisdiction over the FBI why not to a judge before whom their prosecutions are to be tried?

In United States v. Nixon, 418 U.S. 683 (1974) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977), this Court recognized a qualified privilege of confidentiality in Executive conversations which can be breached only for the weightiest

of reasons. The same identical considerations apply at both ends of Pennsylvania Avenue. Congressmen, too, and those who assist them, like the President and his advisors "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.... The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708.

The Court again emphasized that the confidentiality of Presidential communications rests not on any specific clause of the Constitution, rather "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705. Certainly the doings of Congressmen acting in their assigned area of constitutional duties warrant and need the same degree of constitutional protection.

II. THIS COURT MUST PROVIDE GUIDELINES TO THOSE WHO ENFORCE AND ADMINISTER OUR CRIMINAL JUSTICE SYSTEM AS TO THE DUE PROCESS RESTRAINTS UPON GOVERNMENT AGENTS IN THE INDUCEMENT OF AND PARTICIPATION IN CRIMINAL ENTERPRISE

Since its decision in Sorrells v. United States, 287 U.S. 435 (1932), a half century ago, this Court has attempted periodically to define the outer limits of government participation in criminal acivity in an effort to apprehend law-breakers. In the Court's most recent endeavor, an opinion which apparently reflected the least common denominator of a then majority merely acknowledged that government action might at some point reach a "demonstrable level of outrageousness" that would violate Due Process and bar the prosecution from obtaining a conviction of the accused. Hampton v. United States, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring.) Petitioner suggests this is the appropriate case for the Court to articulate the appropriate Due Process standards and/or to define the reach of its own supervisory powers in controlling official law-breaking.[32]

[32]Since Petitioner assumes that other ABSCAM defendants will devote substantial parts of their petitions to this issue, and in view of space

The absence of meaningful standards has provoked an enormous amount of critical legal commentary and has created confusion and conflict in the lower federal courts, as the disparate treatment of ABSCAM prosecutions graphically demonstrate. Two of the three District Court Judges who have thus far heard these cases have found that the government's conduct went beyond the Due Process pale. Judge Fullam found that the "techniques employed" by the FBI "went far

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constraints, we will severely limit our argument on this important point.

In view of space limitations, Petitioner will also omit argument concerning the lower courts' refusal to allow him to seek acquittal on the basis of legal entrapment because he declined to seek a jury instruction on the question. (See Question Presented No. 4) The Court of Appeals held that "a defendant who fails to assert entrapment as a factual defense at his trial, cannot assert it as a legal defense to his conviction." (29a) Petitioner believes that ruling was inconsistent with the theory behind this Court's holding in Sorrells, supra, that entrapment does not have to be raised by a plea in bar but is preserved by a plea of not guilty, 287 U.S. 452, because proof of non-entrapped acts is a material element of every offense under federal statutes. See United States v. Demma, 523 F.2d 981, 983 (9th Cir., en banc, 1975). Should the Court grant cert, he would like to reserve the right to brief that issue.

beyond the necessities of legitimate law enforcement." United States v. Jannotti, supra, 501 F. Supp. at 1204. Although the Court of Appeals reversed, 673 F.2d 578 (3d Cir., 1982), it had similar difficulty in determining the appropriate legal standard:

> If the contours of the entrapment defense are imprecise, we have at least been able to make an effort to delineate them. A similar delineation of the conduct circumscribed by the due process defense is, at best, elusive. (673 F.2d at 606)

Viewing the same set of facts, Judge Aldisert, writing for himself and Judge Weis in dissent, found that ABSCAM "eminates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice," and compared the methods employed by the FBI to those of the Gestapo. 673 F.2d at 613. Judge Bryant, who presided at the Kelly case (United States v. Kelly, 539 F.Supp. 363 (DC,DC 1981), also acquitted the defendant on Due Process grounds, because the government agents persisted in their

effort to corrupt the Congressman after he had rejected their initial bribe offer -- a situation remarkably similar to what was done to Thompson. 539 F. Supp. at 377.[33]

In this case, Judge Pratt could discern no clear standard from the case law to determine whether the government conduct was "outrageous," but constructed his own 22-point test. (138-40a) The Second Circuit ignored Judge Pratt's standard, and appeared to limit the Due Process defense to cases of coercion and bodily intrusion. (32a)

The conflict in the Circuits over the proper due process standard is graphically reflected in the unseemly struggle that took place between the United States Attorneys offices in New Jersey and Brooklyn over ABSCAM procedures, resulting in a decision by the chief prosecutor to try as many of the cases as possible in the Second Circuit rather than in the Third Circuit, where the prevailing precedent was

[33]Judge Penn has had these same issues under advisement for more than a year in the Jenrette case. (D.C., D.C. Crim. Case 90-289)

United States v. Twigg, 588 F.2d 373 (1978).[34] Former New Jersey United States Attorney William Robertson testified to this conflict before the House Judiciary Committee on September 16, 1982, stating that he had unsuccessfully resisted pressures from Washington to transfer the cases to the Eastern District of New York because he felt that would be improper "forum shopping."[35]

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[34] In Twigg, the 3rd Circuit had dismissed a prosecution because government agents had generated crimes by the defendant "merely for the sake of pressing criminal charges against him when ... he was lawfully and peacefully minding his own affairs." 588 F.2d at 381.

[35] According to Robertson:

> After the conclusion of the meeting, Mr. Weingarten approached me privately and indicated that "Washington" wanted him to determine what my position or reaction would be to transferring the MacDonald matter to the Eastern District of New York in order to avoid the impact of the Twigg decision.... [A]fter I had a chance to reflect further on the transfer question, I indicated to Mr. McMurray ... that he should advise Mr. Weingarten that I thought about the proposal some more and that I firmly opposed any transfer of the matter since it would be viewed as forum shopping and an abuse of the Grand Jury in the District of New Jersey. (FBI Undercover Guidelines: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong.,

This case is the paradigm of government "outrageousness" under the test employed by the Third Circuit in Twigg -- the creation of a criminal enterprise out of whole cloth and the enticement of suspicion-free persons into the net.[36] Indeed, it would appear that in targeting Thompson the FBI violated the Attorney General's own Guidelines on Criminal Investigations of Individuals and Organizations, which provide that individuals "should be free from law enforcement scrutiny that is undertaken without a valid factual predicate,"[37] and

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2d Sess. (Hereinafter House Hearings), unpublished statement of William Robertson at 24-5).

[36]One ABSCAM critic commented: "It is bad, evil, illegal and unconstitutional for officers of the United States to engage in the deliberate manufacture of crimes in the hope that their synthetic crimes will ensnare the bad guys." Gould, "A Defeat for Law and Order," New York Law Journal (Feb. 15, 1980).

[37]The American Civil Liberties Union in its report on "The Lessons of ABSCAM" as well as almost every scholar who has commented on ABSCAM -- both those who support such sting operations as necessary law enforcement techniques and those opposed to them -- agree that there ought to be a factual threshhold of suspicion before a bribe offer is made. A number of those comments are set forth in the Final Report of the Senate Select Committee on ABSCAM. See especially excerpts from Professor James Q. Wilson, the

further provide:

> An investigation may be opened when there are facts and circumstances that "reasonably indicate" a federal criminal violation has occurred, is occurring or will occur. This standard of "reasonable indication" is substantially lower than probable cause, but does require specific facts or circumstances indicating a violation. (DP Ex. 3) (emphasis added)[38]

ABSCAM makes clear that the Justice Department and FBI cannot be relied upon to enforce their own guidelines for protection of individual rights and emphasizes the need for judicial guidelines.

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criminologist; Amitai Etzioni, professor of sociology at George Washington University; and Professor Louis Seidman of the Georgetown Law Center. ("The ABSCAM Operation: An Example of the Benefits and Risks of a Long-Term, Complex FBI Undercover Operation and a Demonstration of the Need for Modifications to Existing Statutes, Guidelines and Operational Procedures," Final Report of the Senate Select Committee, Introduction at 5-6. Hereinafter Senate Final Report. References are to the mimeographed version, each separately titled section of which is independently paginated.)

[38]Although these Guidelines were not promulgated until Dec. 2, 1980, the issuing statement by Attorney General Civiletti asserted that they essentially "reaffirm current investigative practices of the FBI."

Indeed, not only was the Attorney General's "predicate" Guideline violated by the ABSCAM probers, wholesale violations of many of the investigative Guidelines are pointed out in the Final Report of the Senate Select Committee. That Report harshly criticizes the operation for reliance on corrupt and unreliable middlemen who were permitted to clandestinely share in alleged bribe payments and went largely unsupervised in their endeavors to entice suspicion-free public officials before the ABSCAM cameras.[39] Former New Jersey US Attorney William

[39]Among the Select Committee's findings:

> The FBI's consistent practice in ABSCAM was to rely, in approving bribe offers, upon the representations of middlemen that specified public officials would accept bribes. Some of those representations were uncorroborated in every sense of the word: the FBI had no extrinsic evidence that the named public official had previously accepted or solicited a bribe or had committed any other crime; and the FBI had no extrinsic evidence that the middleman knew the public official well enough to know whether his own representations about the public offical were true.... In some cases the FBI continued to rely on middlemen even after they had proved to be unreliable in this regard. (Summary of Findings at 39-40)

Robertson was even more scathing in his criticism of his former Justice Department colleagues in testimony before the House Judiciary Committee. Robertson testified that his superiors in Washington even resisted his office's demands that exculpatory evidence be examined and turned over to those who were indicted. He declared: "I have never during the course of my career as a prosecutor been exposed to such institutional resistance and an intentional attempt to thwart the discovery of facts that were relevant to a criminal investigation." (House

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Furthermore, the Committee found that "the middleman had a strong incentive to produce as many public officials as he could, hoping that some percentage of them could be persuaded to accept bribes, whatever their initial inclinations or past records might have been. (Deficiencies Actual and Alleged, at 27)

The Committee also found the FBI ignored guidelines requiring that all "bribe" offers be "clear and unambiguous" as to their illegal nature. (Allegations That Videotape Meetings With Thompson and Murphy Were Deliberately Ambiguous, at 3) For example: "Despite instructions from FBI HQ that on their face seemed to forbid it, Amoroso allowed Criden to leave both [the Murphy and Thompson] meetings in possession of the money." (Id. at 7)

Hearings, Robertson statement at 53)

The evidence of such "due process" infringements in the ABSCAM record are massive and are common to all of the ABSCAM prosecutions.[40] Unique to the Thompson prosecution, and what makes this probably the most "outrageous" case of all, is the deliberate effort of FBI sting-man Weinberg to seduce the defendant by working on his perceived weakness for alcohol. It will not go down as one of law-enforcement's finest hours when Weinberg instructed Criden on how to get Thompson to accept their offer before the camera:

THE SHITTIN GUY'S A BOOZER;

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GIVE HIM ANOTHER DRINK[41]

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[40]And presumably will be detailed in the other Cert petitions. E.g., Petitioner is aware that the Murphy Petition will focus on the creation of false evidence by creative and selective use of audio and video tapes and the use of ambiguous language.

[41]This may well have been the incident the editors of the prestigous New Jersey Law Journal had in mind when they wrote: "Where citizens' stomachs are turned by fundamental unfairness, is there an equivalent federal organ to detect that unfairness? The ABSCAM proceedings wending their way through the judicial system will tell whether there is a federal stomach capable of being turned." Editorial, "ABSCAM

Unless this Court grants Certiorari, such operations are going to become, indeed already have become,[42] commonplace in American law enforcement. Professor Alan Dershowitz of Harvard Law School recently observed:

> The scam as a technique of law enforcement is now out of control. Every prosecutor, undercover investigator and policeman ... is free to conduct any scam he sees fit without fear of judicial rebuke.... The government cannot be allowed to select targets at will, expose them to all manner of temptation and then pounce on those who succumb. (quoted in the Senate Final Report, Introduction at 2)

Indigestion," (Feb. 5, 1982)

[42]The budget for FBI "sting" operations rose from $1 million to $4.5 million and the number of such operations from 53 to 463 between 1977 and 1981. (Senate Final Report, Introduction, at 1.) The Select Committee further reports that the Internal Revenue Service, the Drug Enforcement Administration, the Immigration and Naturalization Service and state and local governments are greatly expanding the use of "sting" operations. (Id. at 10)

Such operations are appealing to police for several reasons. First of all, compared to real crime it's like shooting fish in a barrel. Furthermore, as a sociologist states, it's a way of avoiding disfavored legal restraints. See Marx, "Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work," Crime and Delinquency (April, 1982)

Professor Dershowitz's observation is regularly confirmed by reports of mini-ABSCAMs all across the country. A sampling:

. In Bridgeport, Conn. the Chief of Police wound up arresting an FBI sting-man who was told by the FBI to offer the chief a bribe in exchange for a towing franchise. The Bridgeport police confiscated both the FBI "payoff" and its surveillance equipment. (See New York Times, Aug. 21, 1981, B3)

. A New Jersey Superior Court Judge recently dismissed the indictment of several jockeys for fixing races at the instigation of State Police emulating the FBI. (New York Times Jan. 7, 1982, II, 9:1) Noting that the police had no basis to suspect any of the jockeys were corrupt, the Judge declared: "The government in effect committed crimes in order to ensnare some jockeys. If police agencies are given such free rein, then the only limits to their undercover 'stings' are their imaginations." (New Jersey v. Kelley, et. al., Sup. Ct. of N.J., Bergen County, Law Div., Ind. No. SGJ-85-82(4), Nov. 8, 1982)

. In Cleveland, the FBI spent 4 years seeking to corrupt judges and other court personnel in an alleged bribery investigation. The Cleveland 'Criden' was a man named Marvin Bray, who said he could fix judges for a price. Bray had friends pose as judges and wound up splitting the FBI's bribe money with them. (Cleveland Plain Dealer, July 4, 1982) The only people who wound up indicted were sting-man Bray and two of his associates who impersonated judges. In the process, however, the FBI smeared the reputation of Municipal Judge Clarence Gaines before discovering the man who impersonated Judges Gaines before the FBI's hidden cameras was one of Bray's associates. (Cleveland Plain-Dealer, July 21)

Unless this Court agrees to review this case and set some threshhold requirement before police can instigate crimes and attempt to ensnare suspicion-free citizens, we are all suspects -- and the U.S.A. will be a nation of suspects.

III. THE JURY INSTRUCTION ON CREDIBILITY CHILLS THE RIGHT OF A CRIMINAL DEFENDANT TO TAKE THE WITNESS STAND ON HIS OWN BEHALF, IMPROPERLY INFLUENCES THE JURY, AND CONFLICTS WITH THE DECISIONS OF THIS COURT IN HICKS V. UNITED STATES AND REAGAN V. UNITED STATES

Thompson took the stand at trial and testified in his own defense that he neither had promised to assist the fictional sheiks in their immigration problems, nor had he received any beneficial quid pro quo in exchange. In contradiction, the Government produced two live witnesses, Ellis Cook and John Murtha. Cook gave hearsay testimony under immunity that his partner Criden had told him that he gave $25,000 to Thompson. (Tr. at 430-431) Murtha testified that Thompson came to him on the floor of the House, said some Arabs had several hundred million dollars for investment, and that "There would also be some walking around money available ... $50,000." (Tr. at 441-442)

Credibility of the witnesses was significant. On this issue, Judge Pratt began the Thompson part of

the credibility charge with the comment that a defendant "has a deep personal interest in the result of his prosecution." He then continued to refer in progressively harsher language to Thompson's "greatest interest in its outcome;" to Thompson's "motive for false testimony;" to Thompson's "interest in result ... of a character possessed by no other witnesses," and finally to Thompson's "strong motive to lie." The judge culminated this phase of the charge with the comment that although Thompson "has a strong motive to lie to protect himself, it by no means follows that he's not capable of telling the truthful, straightforward story." (Tr. at 3085-6) The contrast could not have been more extreme in the credibility charge regarding the government witnesses. Judge Pratt informed the jury that the Government must "take the witnesses to a transaction as they are," otherwise "it would be difficult to detect or prosecute some wrongdoers." He concluded that "The thrust of all that I have said to you about accomplices, informers and immunized witnesses is to

caution you to be careful in reviewing that testimony and weigh it with care." (Tr. at 3083) (emphasis added)

This charge is in direct conflict with the only two directly applicable decisions of this Court. In Hicks v. United States, 150 U.S. 442, 451 (1893), the trial judge had charged the jury to consider the self-interest of the defendant which might lead him "away from the truth." The Supreme Court reversed the conviction because of the charge, stating:

> [I]t must be remembered that men may testify truthfully, although their lives hang in balance, and that the law, in its wisdom, had provided that the accused shall have the right to testify in his own behalf. Such privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. (150 U.S. at 452)

The Court cited Hicks with approval in Reagan v. United States, 157 U.S. 301 (1895) and emphasized that the trial court

> is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defen-

> dant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness. (157 U.S. at 310)

No Circuit other than the 2d has permitted charges that explicitly instruct the jury that a defendant "has a strong motive to lie to protect himself." Compare opinion by Judge (now Mr. Justice) Blackmun in Taylor v. United States, 390 F.2d 278, 284-5 (8th Cir., 1968). See also United States v. Saletko, 452 F.2d 193, 197 (7th Cir., 1971), cert. den. 405 U.S. 1040 (1972).

With the increasing use of immunized witnesses and informers, with the growing need for defendants in "scam" types of prosecutions to explain away the deliberate manufactured ambiguities captured on secret government camera, the type of credibility charge given below is nothing short of a corruption of the truth seeking function of the trial process. It demands this Court's review.

IV. THE DECISION BELOW UPHOLDING THE GOVERNMENT'S CONCEALMENT OF THE IMMUNITY GRANTED CONGRESSMAN MURTHA DENIED PETITIONER THOMPSON HIS RIGHT TO A FAIR TRIAL, AND CONFLICTS WITH THIS COURT'S OPINION IN BRADY V. MARYLAND AND RELATED CASES

Congressman John Murtha was the only witness in this case to take the stand and give direct, first hand testimony implicating Thompson in the criminal charges. The issue of his credibility thus was crucial in this case.

There was a videotape showing Murtha in a compromising situation with FBI agents at the W Street house. Consequently, prior to trial, Thompson made a specific request for any materials regarding witness immunity, including "all information reflecting or referring to or constituting, containing, reflecting or suggesting: (a) any promises or indications of immunity, leniency, decisions not to prosecute or favorable treatment to any person, including ... John P. Murtha." (letter to Thomas J. Puccio, Esq. dated June 23, 1980, Exhibit A to Motion for Production of Documents and other Materials) (emph. added) The

government did not inform Thompson prior to trial of any "deals" with Congressman Murtha.

At trial, Murtha was pressed hard on cross-examination, but kept denying that any "deal" had been made with the government. (Tr. at 1864, 1865, 1885, 1893). The government was asked to state on the record the full extent of any promises or assurances made to Murtha; and Prosecutor Puccio denied any promise that Murtha would not be indicted at a later time. (Tr. at 1932)

At trial's end, Thompson wanted a stipulation on Murtha's status for closing argument, and Puccio stated that he would not speculate on whether or not there would be any future indictments. (Tr. at 2781-2782) Irving Nathan, then Deputy Assistant Attorney General, was in the courtroom at the time, and said nothing. He later admitted at the "due process" hearings that a decision had been made not to indict Murtha at the time the decision was made to go ahead with the indictments against Thompson and Murphy. (DP Tr. at 608). He further testified that

the House Ethics Committee, of which Murtha was a ranking member, had been advised in the summer of 1980, about the time Congressman Kelly was indicted, that no additional indictments would be sought. (DP Tr. at 611-612)

This Court held in Brady v. Maryland, 373 U.S. 83 (1963) that the suppression by the prosecution of evidence favorable to the accused is a violation of due process when the evidence is material to either guilt or punishment. When a specific request is made, the evidence suppressed is deemed material if its disclosure "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976). Government concealment that a witness testified under a grant of immunity or promise of leniency is a classic example of a Brady violation. DeMarco v. United States, 415 U.S. 449 (1974); Giglio v. United States, 405 U.S. 150 (1972).

Full disclosure is especially required when it is the government which originates the criminal design and implements the details through corrupt

middlemen to add the requisite touch of authenticity to the "scam." The high risk of corruption and self-aggrandizement requires that the prosecutor be held to the highest duty to disclose all information relevant to the defendant's preparation for trial, and for a fair trial itself.

The issue here is important to the conduct of criminal trials in federal courts, is recurrent, and warrants this Court's attention.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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